

In: KSC-BC-2020-06
The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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**Thaçi Defence Reply to ‘Prosecution response to Thaçi Defence request for
certification to appeal Decision F00854’ (F00905)**

Specialist Prosecutor

Jack Smith

Counsel for Victims

Simon Laws

Counsel for Hashim Thaçi

Gregory Kehoe

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

I. SUBMISSIONS

1. In the early stages of a Court's operation, when procedures and protocols are necessarily novel, appellate review is an important safeguard for the parties and Pre-Trial Judge. The SPO's assertion that none of the 15 Issues identified by the Defence should be considered on appeal is simply not credible or helpful, particularly given that each objectively meets the certification threshold. The Protocol¹ is innovative, broad in scope, and has already been accepted as directly impacting the expeditiousness and fair trial rights of Mr Taçi. Attempting to seal it off from appellate review is inconsistent with the Court's structural framework, which facilitates appellate oversight and resolution of Issues of this kind.

2. The Defence Request² was not "cursory and general", nor was the reasoning "defective".³ A party seeking certification is not required to set out appellate arguments in detail; the Pre-Trial Judge's own decisions indicate that the level of reasoning required to trigger certification is far less than the SPO asserts.⁴ The SPO's criticisms about an alleged "lack of detail" and "failure to explain" or engage with the Decision are misplaced. The 3,000 word limit allows for Issues to be identified, and an explanation given as to why they meet the certification requirements; it does not allow

¹ KSC-BC-2020-06/F00854, Pre-Trial Judge, Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 24 June 2022 ("Decision").

² KSC-BC-2020-06/F00883, Taçi Defence Request for Certification to Appeal the 'Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant', 18 July 2022 ("Defence Request").

³ KSC-BC-2020-06/F00905, Prosecution response to Taçi Defence request for certification to appeal Decision F00854, 1 August 2022 ("Response"), para. 2.

⁴ See, e.g., KSC-BC-2020-06/F00764, Decision on Taçi Defence Request for Leave to Appeal the "Decision on Specialist Prosecutor's Request to Amend its Exhibit List and to Authorise Related Protective Measures", 7 April 2022, paras. 18-20.

for substantive arguments on the errors raised.⁵ The Defence Request more than meets this standard.

3. For **Issue 1**, the phrases cherry picked by the SPO from the Decision do not address the broader issue of encroachment on attorney-client privilege.⁶ The Defence did not assert a right to conduct pre-trial interviews,⁷ the question is whether a requirement that every pre-trial interview be recorded and disclosed to the finders of fact and SPO can be consistent with a right to investigate. The Court of Appeals Panel should decide.

4. For **Issues 2 and 4**, the Defence did not assert that the Protocol's sole statutory basis was Article 39(11), but the Pre-Trial Judge's own reliance on this provision requires consideration of whether the measures provided were necessary, as required by the Law.⁸ **Issue 3** raises a legal issue which is precisely the kind of error to be rectified on appeal: whether the Pre-Trial Judge can decline to consider information directly relevant to his dismissal of Defence submissions.⁹

5. **Issues 5 and 6** do not misrepresent the Decision;¹⁰ the Protocol starts from the position that there are "established risks of disclosing certain information **to the Defence**", and that recording Defence interviews is necessary to create a record which "assists in assessing any **allegations of interference**".¹¹ A statement that there is no

⁵ KSC-BC-2020-06/F00172, Pre-Trial Judge, Decision on the Thaçi Defence Application for Leave to Appeal, 11 January 2021, para. 17.

⁶ Response, paras. 5-6.

⁷ Response, para. 6.

⁸ Response, para. 7; Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").

⁹ Response, para. 11.

¹⁰ Response, paras. 12-14.

¹¹ Decision, para. 124.

“mistrust” of the Defence is undermined entirely by the Protocol’s own stated target and justification.¹²

6. **Issue 7** meets the criteria for certification; the right not to be compelled is a cornerstone fair trial right, and the definition of compulsion and its legal scope is a discrete legal issue properly articulated. The SPO’s objections¹³ to **Issue 8** could only be addressed through a full ventilation of the Issue on appeal. Whether a discrete aspect of the Protocol (the recording and disclosure of interviews) compiles with the relevant Rules (also identified) is a legitimate Issue which meets the certification criteria.

7. **Issues 9 and 10** are properly formulated; the practical risks identified by the Defence are clear and their non-exhaustive nature does not preclude appellate review.¹⁴ That the Pre-Trial Judge directed the Protocol’s privacy protections only towards SPO witnesses is an error which requires a remedy. For **Issue 11**, nothing in the plain wording of the Protocol isolates privacy considerations from video recording and disclosure of interviews. Regardless, the Decision still fails entirely to explain how the accused’s rights are affected or balanced, which the SPO Response does not address.¹⁵

8. **Issues 12 and 13** arise directly from the decision; that prior SPO interviews concerned the Marty Report allegations more broadly is factually incorrect. That the Decision itself fails to recognise the Protocol’s incompatibility with Kosovo law and procedure does not mean that this error cannot be reviewed on appeal.¹⁶ As for **Issue 14**, that expeditiousness was only one consideration of the Pre-Trial Judge does not

¹² Response, paras. 12-14.

¹³ Response, para. 16.

¹⁴ Response, paras. 17-20.

¹⁵ Response, para. 21.

¹⁶ Response, para. 22.

preclude appellate review; the Issue meets the certification criteria.¹⁷ **Issue 15** is not a mere disagreement: the Pre-Trial Judge reached a conclusion without considering the objections of the party in whose favour the proposed measures were supposed to mitigate.¹⁸ This was an error arising directly from the Decision.

9. Every single day, the Protocol impacts and restricts Defence investigations. The Issues meet the certification criteria. Their significant impact on fairness and expeditiousness requires appellate resolution, with the prejudice dramatically increasing if this resolution is not immediate. Leave to appeal should be granted pursuant to Article 45(2) of the Law and Rule 77(2) of the Rules.¹⁹

[Word count: 999 words]

Respectfully submitted,



Gregory W. Kehoe

Counsel for Hashim Thaçi

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At Tampa, United States

¹⁷ Response, para. 24.

¹⁸ Response, para. 25.

¹⁹ Rules of Procedure and Evidence Before Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 (“Rules”).